In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 684

JAMES ANTHONY ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 1359-1373) is reported at 186 F. 2d 439.

JURISDICTION

The judgment of the Court of Appeals was entered on January 4, 1951 (R. 1374), and a petition for a rehearing was denied on February 19, 1951 (R. 1375). On March 16, 1951, the time for filing a petition for a writ of certiorari was extended by order of Mr. Justice Douglas to April 20.

1951, on which date the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether petitioner's conviction of conspiracy to violate the Mail Fraud Act and the Securities Act of 1933 could properly be affirmed when the jury acquitted him of the substantive offenses, the commission of which was realleged in the conspiracy count in addition to various other overt acts in furtherance of the conspiracy.

2. Whether evidence as to petitioner's activities, with respect to his disposition of some of the fruits of the conspiracy, subsequent to its termination, was competent.

STATUTES INVOLVED

18 U.S.C. 88[1] (35 Stat. 1096) provided:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

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[1] This statute was repealed by the Act of June 25, 1948, c. 645, sec. 21 (62 Stat. 862), effective September 1, 1948, and is now covered by 18 U.S.C. 371.

18 U.S.C. 338[2] (35 Stat. 1130) provided in pertinent part as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

15 U.S.C. 77e (48 Stat. 77, as amended, 48 Stat. 906) provides in pertinent part as follows:

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[2] This section was also repealed by the Act of 1948 (see fn. 1, *supra*) and is now covered by 18 U.S.C. 1341.

(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

15 U.S.C. 77q (48 Stat. 84) provides:

(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of trans-

portation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemptions provided in section 77c shall not apply to the provisions of this section.

STATEMENT

An indictment, containing seven counts (R. 2-13), was returned jointly against petitioner and two others, Keane and Grismer, in the United States District Court for the Eastern District of Washington. The first three counts (R. 2-7) charged that, between 1945 and 1946, they unlawfully used the mails, in furtherance of a scheme to defraud stockholders by false representations, in violation of 18 U.S.C. 338. The succeeding three counts (R. 7-10) charged that, during the same period, in the sale of securities pursuant to a fraudulent scheme, they unlawfully used the mails in violation of 15 U.S.C. 77q. Count 7 (R. 10-13) charged that, between 1945 and 1948, they conspired to violate the Mail Fraud Act and the Securities Act of 1933 by agreeing to sell and

deliver by mail securities, without first effecting their registration, in accordance with a scheme to defraud the purchasers thereof and to obtain money by false pretenses and representations.

The charge relative to the fraudulent scheme alleged in part that the conspirators would and did promote and organize Lucky Friday Extension Mining Company and Pilot Silver-Lead Mines, Inc., both Idaho corporations (hereinafter referred to as "Extension" and "Pilot", respectively), and issue "a large portion of the stock of these corporations to themselves, but would and did conceal the fact that defendant Allen was a promoter of these corporations or was to receive any part of the stock to be taken by defendants; that defendants * * * [would and did] conceal the true amount of stock issued to them * * *; that defendants would and did cause these corporations to sell stock to investors upon the representation that the proceeds therefrom would be used by these corporations for the exploration and development of the mining properties of Extension and Pilot respectively; that defendants * * * would and did conceal from the stockholders * * * information concerning the receipt and expenditure of moneys * * *; that defendants would and did appropriate and divert from these corporations a large amount of such corporate moneys to their own use and benefit" (R. 3-4).

Petitioner was tried alone.[3] He was acquitted on the first six counts and found guilty on count seven (R. 88, 1283), on which he was sentenced to 18 months' imprisonment (R. 93-94, 1290-1291). On appeal, the judgment of conviction was affirmed (R. 1373). After a meticulous review of the evidence, the court below stated, "Our only reason for thus outlining in such detail the Government's proof of Allen's participation in these diversions, is that counsel for appellant have so earnestly argued that there is a total want of evidence that Allen participated in an admittedly fraudulent scheme. In our view this complaint is without merit" (R. 1367).

The evidence adduced by the Government generally tended to prove the following:

In the summer of 1943, petitioner and Keane incorporated the Montana Leasing Company, which they later conducted as a partnership, for the purpose of operating some mining dumps ad-

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[3] Keane, with the trial court's consent, entered a plea of *nolo contendere* as to all counts of the indictment save count six (R. 27-48), and Grismer entered a similar plea as to count seven (R. 49-54). Petitioner also had entered a plea of *nolo contendere* as to all counts except count six, which the court had dismissed (R. 55-57). However, on the date set for sentence, petitioner, after inquiring of the court whether a jail term could be expected and being advised that the court had the power to prescribe a prison term on the plea entered, moved for a withdrawal of his plea of *nolo contendere* and the substitution of a plea of not guilty (R. 58-65). The court granted the motion (R. 67) and reinstated count six (R. 66), and the judge disqualified himself from presiding at petitioner's trial (R. 64-69). Keane and Grismer testified on behalf of the Government during petitioner's trial (R. 381-482, 607-793). Subsequently, Keane was sentenced to pay a

joining the property of Lexington Mining Company (R. 414-415, 609-610, 680, 684, 739, 741). The money for the operation of the Montana Company was derived from Independence Lead Mines Company, through the intercession of Keane (R. 690-694). In the spring of 1945, when Independence Company funds were almost depleted (R. 610), petitioner proposed to Keane that they organize and promote a new company, dispose of its stock, and "bail ourselves out" of the indebtedness created through the Montana Leasing operations (R. 385, 611-612, 709, 712-713). As a result, the Lucky Friday Extension Mining Company was incorporated in Idaho and promoted in the State of Washington under the supervision of petitioner and Keane (R. 150-153, 523-525, 537-539, 540-542, 549-550, 614-615, 744-746).

Petitioner was under a court injunction, which, in effect, precluded any corporation of which he might be a promoter, from filing under the exemptive regulations of the Securities Act in conjunction with any public offering of its securities (R. 541, 591-592, 609, 612-613; Ex. 121, R. 881). Therefore, Grismer, who had worked for petitioner, was made to appear as the principal promoter of Extension and became its nominal president (R. 382-383, 385, 390, 612-614). At peti-

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fine of $1500, the imposition of the imprisonment portion of the sentence was suspended, and he was placed on probation for four years (R. 117). Imposition of sentence on Grismer was entirely suspended and he was placed on probation for two years (R. 118).

tioner's direction, mining claims in land contiguous to that of Lucky Friday Silver Mining Company (known as Big Friday), were staked out in Grismer's name (R. 385-387, 541).

According to copies of the prospectus mailed to the public, the proceeds from the proposed sale of Extension stock were to be expended in the development of this property (R. 483-490, 526, 541-544, 1363; Ex. 69, R. 490). Petitioner and Keane agreed, however, that Grismer was to receive 1,229,700 shares of Extension promotion stock, purportedly for the mining claims, but that he was to endorse these shares and turn them over to the corporation (R. 388, 399, 614). Grismer actually received only 100,000 shares, the balance going to petitioner and Keane,[4] subject to their commitments made to parties actually having an interest in the mining claims conveyed to Extension (*ibid*). Likewise, out of 500,000 shares purportedly issued as a fee to the attorney who arranged for the public offering of the stock, 425,000 shares were to be endorsed by the attorney and returned to petitioner and Keane (R. 544-547, 559-560, 614). Out of all the promotion stock issued by Extension, about 790,000 shares found their way into petitioner's hands. Admittedly, these shares were sold at in-

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[4] Petitioner and Keane had a long standing agreement that they were to be equal partners in all their enterprises (R. 725, 726-727, 741).

creased market prices,[5] thus affording petitioner a substantial income (R. 870-872, 1139).[6]

Almost immediately after Extension's first stock offering, petitioner and Keane began to divert Extension's funds for their personal expenses and unrelated ventures (R. 149, 151, 163-171, 202, 328-339, 644-647).[7] Between July 1945 and May 1946, $113,000 of the $178,000 received by Extension

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[5] During the organization of Extension, petitioner commenced negotiations on its behalf with the Big Friday. Shortly after the first issue of Extension stock, two contracts were concluded whereby Big Friday would develop and exploit the Extension land by projecting its shaft into Extension's adjoining property at the latter's expense, which eventually amounted to about $80,000. The ore mined was to be shared mutually by the parties (R. 258-264, 391-392, 658-659, 712-713). The news of these contracts greatly increased the market value of Extension stock. At that time petitioner and Keane unloaded at the increased price 300,000 of the original shares of promotion stock which had been held back, netting the corporation $78,000 (R. 392, 447, 549-550, 604-605).

[6] At least 455,000 shares returned by Grismer were sold at increased prices through brokerage accounts in the names of petitioner, his wife, or on his behalf (R. 344-353, 490-492, 496-505, 1134-1135; Ex. 47, R. 350; Ex. 50a, R. 824; Ex. 74, R. 500; Ex. 116, R. 883). Also about 335,000 of the 425,000 shares of Extension stock purportedly issued for attorney fees were sold, at increased prices, by petitioner or Keane directly or through petitioner's or his wife's brokerage accounts (R. 501-503, 794-801, 815-825, 870-872; Ex. 9-a, R. 640; Ex. 75, R. 501; Ex. 96, R. 800; Ex. 104, R. 825; Ex. 105, R. 825; Ex. 114, R. 853; Ex. 118, R. 877).

[7] The secretary in Keane's law firm was an assistant secretary of Extension with authority to sign Extension checks (R. 149, 151). In August 1945, she signed a blank Extension check, at the request of petitioner, who made it payable in the amount of $10,000 to Delaware Mines Corporation, which he controlled (R. 163-171, 202, 328-339, 643, 675, 1028-1029; Ex. 6a, R. 166, 642). Later, petitioner used Delaware checks to cover various obligations, including personal expenditures (R. 328-339).

from its two stock offerings, was diverted to Montana Leasing Company, or its successor, Lexington Silver-Lead Mines, Inc.,[8] corporations wholly owned and controlled by petitioner and Keane. Part of the money so diverted was used for personal expenses (R. 157, 173, 233-234, 615-618, 658, 662-664, 1115, 1160; Ex. 108, R. 836; Ex. 118, R. 878; Ex. 119, R. 878; Ex. 120, R. 880).

In December 1945, petitioner and Keane were instrumental in organizing, along the same lines as Extension, Pilot Silver-Lead Mines, Inc., which, presumably, was to develop in Idaho certain mining claims and patents assigned to the corporation (R. 285-289, 296, 393-398, 400, 414, 551-556, 565-569, 620-623). The Pilot prospectus (Ex. 68, R. 490) stated that out of 670,000 shares to be issued to Keane he was to retain 550,000 shares "for his promotional efforts in connection with the acquisition" of mining claims for the company (R. 622). However, it was agreed between petitioner and Keane that they were to be co-owners of these shares, and were to own 400,000 shares out of the 900,000 issued to Grismer for the mining patents transferred by him (R. 622-624). Also, only 25,000 shares out of the 150,000 shares purportedly issued for legal services were to be retained by the attorney, the balance to be returned, duly endorsed,

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[8] The prevalent practice was to cover all overdrafts on Montana Leasing and Lexington Silver-Lead bank accounts by the transfer of Extension or Pilot funds (R. 617-619).

to petitioner and Keane (R. 277-283, 624).[9] In May 1946, Pilot offered to the investing public 1,000,000 shares (R. 180-182, 190-193, 327, 342-343, 526, 527-530, 532-535, 575-578; Ex. 110, R. 840) which netted the company $100,000 (Ex. 10, R. 534, Ex. 11, R. 529; Ex. 12, R. 524; Ex. 13, R. 507). By September 12, 1946, this sum was depleted to about $10,000 as a result of petitioner's and Keane's misappropriations (R. 185-187, 617-619, 662-663; Ex. 112, R. 840; Ex. 113, R. 840).[10]

As a result of these diversions, Extension and Pilot ran out of working capital and their mining operations ceased in December 1946 (R. 406-407). Keane and petitioner had a falling-out at that time (R. 461, 660-662).

ARGUMENT

1. Petitioner does not deny that the evidence adduced by the Government proves a conspiracy

[9] Petitioner and Keane quickly disposed of most of the stock by sale through their brokerage accounts (Ex. 31, R. 508; Ex. 31a, R. 508; Ex. 117, R. 883).

[10] The diversion of Pilot funds was as follows: Between May and August 1946, $61,300 went to Lexington Silver-Lead Mines, Inc., the successor to Montana Leasing Company (R. 657; Ex. 15, R. 641; Ex. 112, R. 840; Ex. 113, R. 840); on May 22, 1946, $15,000 went to Coeur d'Alene Consolidated Silver Lead Mines, Inc. (jointly controlled by petitioner and Keane (R. 411)), in payment of that company's obligation under a development contract with another mining company (R. 313-316, 324-326, 626-629, 657); on June 25, 1946, $10,000 went to Independence Lead Mines, Inc., in which Keane exercised control, but petitioner had no controlling interest. However, previously, Independence had advanced large sums of money to Montana Leasing (R. 656-657, 690, 1123-1124) and had given $1,200 to War Eagle Silver-Lead Mines, Inc., in which petitioner and Keane each owned one-third interest, in order to cover an overdraft of that company's bank account (R. 199-200, 655-656; Ex. 15a, R. 200; Ex. 15b, R. 200).

to use the mails to defraud the investing public by a scheme involving the organization and operation of the two corporations, accompanied by all the fraudulent elements charged in the indictment. He argues, however, that, since the jury acquitted him of the offenses charged in the first six counts, which offenses were alleged to be the object of the conspiracy, the verdict of guilty on the conspiracy count is necessarily inconsistent with and repugnant to its findings on the substantive counts; that this inconsistency was occasioned by the Government through its misuse of the conspiracy statute; and that this Court's ruling in *Dunn* v. *United States,* 284 U.S. 390, should be reversed (Pet. 15-27).

There is abundant evidence to prove beyond a reasonable doubt that, during the time charged in the indictment, petitioner participated in a sustained concert of action with Keane and Grismer in the organization and promotion of both Extension and Pilot, in the sale of their securities to the public by means of prospectuses containing false and misleading representations, in the unloading on the market of personally-owned promotion stock at enhanced prices, and in the misappropriation and diversion of the funds of these corporations. Not only is the accomplices' testimony (R. 381-482, 608-793) sufficient in itself to prove petitioner guilty of conspiracy, but, as the court below painstakingly pointed out, there is additional testi-

mony of independent witnesses and documentary evidence [11] which, independently, sustain the guilty verdict.

The acquittal on the substantive counts and the conviction on the conspiracy count are not inconsistent, because the offense of conspiracy is not the commission of the crime which it contemplates and neither violates nor arises under the statute whose violation is its object. *Pinkerton* v. *United States,* 328 U.S. 640; *Braverman* v. *United States,* 317 U.S. 49. The acquittal on the substantive counts does not negative any of the elements charged in the conspiracy count, especially since the conspiracy count in its allegations of overt acts did not rely merely on the substantive offenses alleged in the first six counts, but, in addition, alleged other overt acts. Substantive counts require the proving of completed acts, whereas a conspiracy count can be proved by showing an agreement plus one overt act. *Samuel* v. *United States,* 169 F. 2d 787 (C.A. 9); *Heskett* v. *United States,* 58 F. 2d 897 (C.A. 9), certiorari denied, 287 U.S. 643. The jury might very well have believed that petitioner did combine, confederate and agree with Keane and Grismer to divert and embezzle funds of Extension and Pilot and to commit certain overt acts, but they may not have been satisfied

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[11] See R. 148-209, 258-263, 279-283, 285-286, 295-298, 368-381, 537-555, 957-971.

as to his connection with the jurisdictional mailings alleged in the substantive counts.[12]

Moreover, assuming, *arguendo,* that there was an inconsistency in the verdict, the short reply is that under the ruling of this Court in *Dunn* v. *United States,* 284 U.S. 390, 393, consistency in the verdict is not necessary. This ruling was recently reaffirmed by this Court in *United States* v. *Dotterweich,* 320 U.S. 277, 279, and there is no occasion to reconsider it. See also *Langford* v. *United States,* 178 F. 2d 48, 52 (C.A. 9), certiorari denied, 339 U.S. 938.

2. Petitioner also contends (Pet. 28-31) that the trial court erred in receiving in evidence (Ex. 48, R. 771) stock broker's checks (proceeds from which went to petitioner (R. 344-349)), given in payment of Extension promotion stock originally issued to Grismer, since these checks were issued for the sale of the stock subsequent to December 26, 1946, the date of the alleged termination of the conspiracy.[13] We submit that the date of

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[12] As to the contention that the prosecution involved an abuse of the conspiracy statute, the court below stated (R. 1373): "We think it sufficient to say that we find no evidence of any misuse of the statute in this case. So long as this statute remains law, this argument against use of a conspiracy charge is not one properly addressed to us." Indeed, in its revision in 1948 of Title 18 of the United States Code, Congress had occasion to consider the wisdom of retaining this crime on our statute books. Congress not only retained it, but gave it added importance by increasing the punishment provided thereunder for a felony from two years to five years.

[13] The mere fact that Keane had a falling-out with petitioner and Grismer did not necessarily terminate the conspiracy unless definite and affirmative steps were taken to that

the termination of the conspiracy is irrelevant to this issue since the evidence objected to did not involve any statements by a co-conspirator which must have been made during the course of the conspiracy in order to be admissible as an exception to the hearsay rule. These cancelled broker's checks were properly received, regardless of the termination of the conspiracy, as direct evidence tending to prove petitioner's participation in the promotion of Extension and Pilot and his disposition of stock after exhausting the corporate funds. As the court below held (R. 1370), this "evidence, of Allen's later sales of promotion stock, was clearly properly received for the purpose of showing Allen's earlier acquisition of the stock which he was thus undertaking to dispose of. We find no error in the receipt of this evidence, or in the court's refusal to strike it, regardless of whether the conspiracy did, or did not, end on the date mentioned."

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end. *Baldwin* v. *United States*, 72 F. 2d 810 (C.A. 9), certiorari denied, 295 U.S. 761. Furthermore, Keane may have been expelled and the conspiracy between petitioner and Grismer may have continued.

CONCLUSION

The judgment below is correct, and the petition for certiorari presents no question requiring further review by this Court. We therefore respectfully submit that the petition should be denied.

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